88-1291

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

WILLIAM F. GREGORY, MICHAEL C. SULLIVAN
and SULLIVAN-GREGORY, INC.,
a Michigan corporation,

Petitioners,

-vs-

POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC.,
a Louisiana corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

Whether Petitioners, Citizens of and Governed by the Laws of the State of Michigan, Have Been Denied Due Process of Law Where, in a Diversity Case Tried by the United States District Court in the State of Michigan, the District Court Imposed a Remedy on Petitioners, Which is Contrary to the Laws and is Not Available in the Courts of the State of Michigan?

II.

Whether The Mandate of *Erie* was Violated Where, in a Diversity Case, the District Court Imposed on Petitioners a Harsh Remedy, Which is Contrary to the Laws and is Not Available in the Courts of the State of Michigan and Where the Court of Appeals Affirmed the District Court, by Misstating the Record and by Erroneously Fabricating an Unknown and Unrecognized Category of Contract?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States District Court were:

i) William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., residents of the State of Michigan, Petitioners herein;

ii) Popeyes Famous Fried Chicken & Biscuits, Inc., a resident of the State of Louisiana, Respondent herein.

DESIGNATION OF CORPORATE RELATIONSHIPS

The Sullivan-Gregory, Inc. corporation, filing this Petition for Writ of Certiorari as a Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Sullivan-Gregory, Inc. is not a subsidiary or an affiliate of a publicly-owned corporation.

There is not a publicly-owned corporation not a party to the appeal that has a financial interest in the outcome.

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DATED: January 30, 1989

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Designation of Corporate Relationships	iii
Table of Authorities	vii
Opinion Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case:	
1. BACKGROUND	2
2. COURSE OF PROCEEDINGS IN THE DISTRICT COURT	3
A. Petitioners' Claim	3
B. Respondent's Counterclaim	4
3. PROCEEDINGS IN THE COURT OF APPEALS	5
Reasons for Granting the Writ	7-24
I. PETITIONERS, CITIZENS OF AND GOVERNED BY THE LAWS OF THE STATE OF MICHIGAN, HAVE BEEN DENIED DUE PROCESS OF LAW WHERE, IN A DIVERSITY CASE TRIED BY THE UNITED STATES DISTRICT COURT IN THE STATE OF MICHIGAN, THE DISTRICT COURT IMPOSED A REMEDY ON PETITIONERS, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN.	13
II. THE MANDATE OF *ERIE* WAS VIOLATED WHERE, IN A DIVERSITY CASE, THE DISTRICT	

Page

COURT IMPOSED ON PETITIONERS A HARSH REMEDY, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN AND WHERE THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT, BY MISSTATING THE RECORD AND BY ERRONEOUSLY FABRICATING AN UNKNOWN AND UNRECOGNIZED CATEGORY OF CONTRACT. 20

Conclusion 24

APPENDICES:

Appendix A — TRANSCRIPT of the Hearing in the United States District Court for the Eastern District of Michigan on Respondent's Motion for Summary Judgment ..... A-1 – A-15

Appendix B — JUDGMENT of the United States District Court ..... B-1 – B-2

Appendix C — *PER CURIAM* OPINION of the United States Court of Appeals for the Sixth Circuit ..... C-1 – C-9

Appendix D — ORDER of the Court of Appeals Denying Rehearing D-1

Appendix E — ORDER of the Court of Appeals Denying the Petition for Rehearing En Banc E-1

Appendix F — ORDER of the Court of Appeals Granting the Motion to Stay Mandate F-1

TABLE OF AUTHORITIES

Page

CASES:

Boling v. *Sharpe*, 347 U.S. 497 (1954) 13

Day & Zimmermann, Inc. v. *Challoner*, 423 U.S. 3 (1975) 21

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 11, 20, 24

Farrington v. *State of Tennessee*, 95 U.S. 558 (1877) 10, 21

Klaxon Company v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941) 20-21

Mt. Ida School for Girls v. *Rood*, 253 Mich. 482 (1931) 8-9, 16, 17, 22, 23, 24

Rubin v. *Gallagher*, 294 Mich. 124 (1940) 23

Schneider v. *Rush*, 377 U.S. 163 (1964) 13, 14

School of Commerce v. *Stroud*, 248 Mich. 85 (1929) 8, 14, 15, 16, 22

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, Amendment 5 .... 2, 13

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 3

Michigan Franchise Investment Law of 1984,
M.C.L. § 445.1501 12
M.C.L. § 445.1527 12

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The transcript of the hearing in the United States District Court for the Eastern District of Michigan on Respondent's motion for summary judgment is included in App. A, *infra*, pp. A-1 to A-15. This transcript includes argument of counsel and conclusions of law of the district court. The district court made no findings of fact and issued no separate opinion. The Judgment of the district court (App. B, *infra*, pp. B-1 to B-2) is unreported.

The *per curiam* Opinion of the United States Court of Appeals for the Sixth Circuit (App. C, *infra*, pp. C-1 to C-9) is unreported. The Order of the Court of Appeals

denying rehearing (App. D, *infra*, p. D-1) is unreported. The Order of the Court of Appeals, denying the petition for rehearing en banc (App. E, *infra*, p. E-1) is unreported. The Order of the Court of Appeals granting the motion to stay mandate (App. F, *infra*, p. F-1) is unreported.

JURISDICTION

The *per curiam* Opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 9, 1988. The Order of the Court of Appeals denying the petition for rehearing was entered on November 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The applicable provision of the United States Constitution, fifth amendment, is:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

1.

BACKGROUND

Sullivan-Gregory, Inc. is a Michigan corporation, which was formed for the purpose of owning and operating franchise stores selling Popeyes Famous Fried Chicken and Biscuits at certain locations in Oakland County, Michigan. Michael C. Sullivan, a resident of the State of Michigan is an individual shareholder of Sullivan-Gregory, Inc. William F. Gregory is also a resident of the State of Michigan and an individual shareholder of Sullivan-Gregory, Inc. (Sullivan-Gregory, Inc., Michael C. Sullivan and William F. Gregory will hereinafter be referred to collectively as "Petitioners").

Popeyes Famous Fried Chicken & Biscuits, Inc. is a Louisiana corporation, and the franchisor of the "Popeyes Famous Fried Chicken System", with 670 stores located throughout the United States (Popeyes Famous Fried Chicken & Biscuits, Inc. will hereinafter be referred to as "Respondent").

During the period 1979 to 1983, Petitioners entered into six franchise agreements with Respondent and opened six franchise stores. The material provisions of the six franchise agreements were identical.

On March 28, 1985, pursuant to 28 U.S.C. § 1332, Petitioners commenced a lawsuit against Respondent in the United States District Court for the Eastern District of Michigan. Petitioners' claim against Respondent concerned the obligation of Respondent to provide advertising under the franchise agreements. Jurisdiction in the district court was based on diversity of citizenship.

On May 22, 1985, Respondent filed a counterclaim against Petitioners demanding damages for breach of the franchise agreements. Respondent claimed that Petitioners failed to pay certain royalty and advertising fees.

2.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

A. Petitioners' Claim

Trial before the district court took place on the mornings of March 26, 27 and 30, 1987. During the trial, Petitioners claimed that Respondent breached the franchise agreements by failing to provide advertising.

Respondent denied that it had a duty to provide advertising under the franchise agreements. William

Copeland, Respondent's Executive Vice President, testified: ". . . if money was paid [by Petitioners], we would provide advertising for them".

At the close of Petitioners' proofs, Respondent made an oral motion to dismiss Petitioners' claim. The district court ruled that under the franchise agreements Respondent had no duty to provide advertising for the benefit of Petitioners. The Court granted Respondent's motion and dismissed Petitioners' claim.

This petition for writ of certiorari is not concerned with the district court's dismissal of Petitioners' claim.

B. Respondent's Counterclaim

The following day, on March 31, 1987, the parties returned for trial on Respondent's counterclaim. Respondent then made an oral motion for summary judgment. The hearing on the motion lasted some fifty-five minutes. (The transcript of the hearing is included in App. A, *infra*, pp. A-1 to A-15.) In its motion, Respondent demanded judgment against Petitioners in the full contractual amount under the franchise agreements, namely, three percent of gross sales for advertising and five percent of gross sales for royalties.

Petitioners opposed Respondent's motion for summary judgment, on the ground that Respondent had "not sustained any damage". Petitioners' argument was based on the district court's prior ruling that Respondent had no duty to provide advertising for the benefit of Petitioners and on Respondent's admission that it did not provide advertising unless and until the fees for advertising were paid.

The district court made no findings of fact. More particularly, the court neither made a finding of performance on the part of Respondent nor a finding of the

amount of damages sustained by Respondent. In addition, the court did not construe the contract (App. A, *infra*, pp. A-1 to A-15).

The court did, however, grant summary judgment in favor of Respondent for the total contract price under the franchise agreements.

On April 3, 1987, the court entered judgment against Petitioners William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., jointly and severally, in the amount of Nine Hundred Twenty Six Thousand Four Hundred Twenty and 79/100 ($926,420.79) Dollars (App. B, *infra*, pp. B-1 to B-2).

On May 4, 1987, pursuant to 29 U.S.C. § 1291, Petitioners duly filed their appeal with the United States Court of Appeals for the Sixth Circuit from the judgment entered by the district court.

3.

PROCEEDINGS IN THE COURT OF APPEALS

Petitioners' principal argument on appeal was that the law of the forum, namely, the law of the State of Michigan, governs the remedy for breach of the franchise agreements.

Petitioners are all residents of the State of Michigan. Suit was brought in the United States District Court for the Eastern District of Michigan. Jurisdiction was based on diversity of citizenship. It is the well-settled law of the State of Michigan that a party to an executory contract is liable only for damages resulting from breach of the contract and not for the total contract price. In addition, the party seeking damages has the burden of proving its damages.

In their respective appellate briefs, neither Petitioners nor Respondent disputed the fact that the franchise agreements were executory on the part of both parties. On the one hand, Petitioners had not performed because they had not paid certain fees. On the other hand, Respondent had not performed because it provided advertising only after the fees were paid by Petitioners.

In its *per curiam* Opinion, the Court of Appeals acknowledged that "[u]nder Michigan law, a party to an executory contract is liable only for actual damages resulting from a breach, and not necessarily for the full contract price". (App. C, *infra*, p. C-6).

Nevertheless, the Court of Appeals affirmed the judgment of the district court in favor of Respondent for the full contract price. (App. C, *infra*, p. C-9.) The Court of Appeals did so by ruling:

> "We believe there was no error demonstrated in the district court's construing the contract to be *indivisible* and *nonexecutory in its nature.*" (App. C, *infra*, p. C-6.) (Emphasis added)

The Court of Appeals' ruling misstates the record. The district court record on Respondent's oral motion for summary judgment clearly indicates that the district court did not construe the contract. On the contrary, the district court granted summary judgment for the full contract price merely on the basis that the contract called for payment of certain fees. (App. A, *infra*, pp. A-1 to A-15.)

On September 21, 1988, Petitioners duly filed a petition for rehearing and, thereafter, a supplement thereto including suggestion for rehearing en banc. Petitioners' petitions were denied on November 4, 1988 and Nov-

ember 9, 1988, respectively. (App. D, *infra*, p. D-1 and App. E, *infra*, p. E-1.)

On November 11, 1988, Petitioners filed a motion to stay the issuance of the mandate pending application for writ of certiorari. By an Order dated November 29, 1988, the Court of Appeals granted Petitioners' motion to stay the issuance of the mandate for a period of sixty days. (App. F, *infra*, p. F-1.)

Now, Petitioners file this Petition for Writ of Certiorari to this Court. This Petition is concerned only with the counterclaim of Respondent and not with the claim of Petitioners.

REASONS FOR GRANTING THE WRIT

The facts of the instant case are essentially not in dispute. Respondent filed a counterclaim against Petitioners based on breach of certain franchise agreements in the United States District Court in Michigan. Jurisdiction was based on diversity of citizenship.

Respondent is a resident of Louisiana. Petitioners are residents of Michigan. As residents and citizens of the State of Michigan, Petitioners have the right to be governed by the laws of the State of Michigan.

In determining the appropriate remedy for breach of contract, Michigan law recognizes contracts which are "executed" and, alternatively, contracts which are "executory". There is no case in Michigan which has defined or recognized a contract which is "non-executory in its nature". Under well-settled Michigan law, once it is determined that a contract is executory, the appropriate remedy for breach is actual, proven damages and not the full contract price. In addition, it

is the burden of the party seeking a remedy for breach to prove any damages arising from the breach.

In Michigan, it is a rule of law, which has been unequivocally and definitively stated by the Michigan Supreme Court, that where there is breach of an executory contract the only remedy available is the actual proven damages and not the contract price. In 1929, in a leading case, *School of Commerce* v. *Stroud*, 248 Mich. 85 (1929), the Supreme Court of Michigan declared the law of Michigan to be:

> "'It is the rule in this State that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract.'" *Id* at 88.

The Court concluded:

> "Plaintiff having no right to maintain any other action against defendant than for breach of contract, and having adduced no proof of any damage resulting from such breach, none may be awarded." *Id* at 90.

Two years later, the Michigan Supreme Court decided a second leading case, *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482 (1931). Again, the Court declared:

> ". . . in Michigan it is a rule of law, and we think a rule of procedure or remedy, that a party to an executory contract may always stop performance by the other party and refuse further to perform on his part, and after his refusal, he is 'liable only upon the breach of the contract'; and fur-

> ther, quoting from cases cited, it is said: 'The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.'" *Id* at 486.

The Supreme Court rejected the plaintiff's claim of recovery based upon "defendant's independent promise to pay the contract price, regardless of nonperformance by plaintiff". *Id* at 485.

> "This question was squarely ruled upon in *International Text-book Co.* v. *Jones*, 166 Mich. 86; and the plaintiff's claim of right to recovery on the theory of an independent promise was rejected." *Id* at 488.

The Court ruled that, ". . . the established rule of law in Michigan is otherwise," and that,

> "The burden is upon plaintiff not only to establish a right to recover but likewise to establish the extent of recovery." *Id* at 489.

In its conclusion, the Court affirmed *Stroud, supra*, and affirmed judgment for the defendant. *Id* at 490.

The salient undisputed fact in the instant case is that a material provision of the franchise agreements, namely, the advertising provision, had not been performed either by Petitioners or by Respondent. Petitioners had not paid the advertising fees. Conversely, Respondent had not provided advertising services, where and because it had not received the advertising fees.

Nevertheless, the district court granted summary judgment for the full amount of the contract. The court made no findings, either as to whether the contracts were executed or executory or whether the contracts had been performed. The court summarily entered a

judgment based on the total contract price in the amount of $926,420.79. Such granting of summary judgment and entry of judgment based thereon were clearly contrary to and not available as a remedy under Michigan law.

On review, the Court of Appeals fabricated a new category of contract. Theretofore, under Michigan law, a contract was either executed or executory. However, the Court of Appeals ruled that a contract may be ". . . nonexecutory in its nature". This new category is not recognized either in Michigan law or in federal law.

In 1877, this Court itself declared that contracts are either "executed" or "executory", and contrasted "executed" and "executory" contracts in the following terms:

> "Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done." *Farrington* v. *State of Tennessee*, 95 U.S. 558, 559 (1877).

In contrast,

> "An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties." *Ibid.*

The Court of Appeals' ruling in the instant case that the contract was ". . . nonexecutory in its nature" is meaningless and self-contradictory. A contract is either executory or executed in fact, depending upon the fact of performance by the parties. *Farrington* v. *State of Tennessee, supra.*

In addition, it is a clear misstatement of the record to rule that the district court construed the contract "to be indivisible and nonexecutory in its nature". (App. C, *infra*, p. C-6.)

A reading of the entire proceeding before the district court on Respondent's motion for summary judgment shows unequivocally that the district court neither made findings of fact nor did it construe the contract. (App. A, *infra*, pp. A-1 to A-15.)

By affirming the judgment of the district court, by inventing a new category of contract and by misstating the record, the Court of Appeals affirmed a remedy against Petitioners which is not available in the courts of the State of Michigan and is contrary to the laws of the State of Michigan. In effect, the Court of Appeals' ruling denies Petitioners due process of law.

Respondent has been granted a remedy against residents and citizens of the State of Michigan in a federal court which clearly would be unavailable in a Michigan court.

Furthermore, the courts below clearly violated the mandate of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Both the district court and the Court of Appeals failed, refused, avoided and did not follow the clear and unequivocal law of the forum, namely, the law of the State of Michigan. Review by this Court is necessary to protect Petitioners' constitutional right to due process, to uphold *Erie* and to prevent a gross injustice.

Finally, review by this Court is necessary to correct a situation which will severely impair the ability of the State of Michigan, and perhaps other states, to regulate the business of franchising. Franchising is a rapidly expanding form of business activity, involving thousands of franchisees. Franchises and the respective

rights, duties and obligations of franchisees and franchisors raise questions of exceptional and fundamental importance for the courts, for the parties and for the public.

For these reasons, in 1974, the State of Michigan enacted the Michigan Franchise Investment Law. M.C.L. § 455.1501 *et seq*. The declared purpose of the act is,

> "... to regulate the offer, sale, and purchase of franchises, to prohibit fraudulent practices in relation thereto; ..."

Furthermore,

> "This act shall be broadly construed to effectuate its purpose of protection to the public." Michigan Franchise Investment Law, preamble and § 455.1501.

In 1984, in order to regulate further the business of franchising, the State of Michigan enacted an amendment to the Michigan Franchise Investment Law. This amendment states that a provision in a franchise agreement which requires that litigation be conducted outside the State of Michigan is void and unenforceable.

> "Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise.
>
> * * *
>
> (f) A provision requiring that arbitration or litigation be conducted outside this state." Michigan Franchise Investment Law, M.C.L. § 455.1527.

If a federal court sitting in the State of Michigan refuses to follow the law of the State of Michigan in a

diversity case, how then can the Legislature of the State of Michigan protect its citizens and residents and regulate the business of franchising?

I.

PETITIONERS, CITIZENS OF AND GOVERNED BY THE LAWS OF THE STATE OF MICHIGAN, HAVE BEEN DENIED DUE PROCESS OF LAW WHERE, IN A DIVERSITY CASE TRIED BY THE UNITED STATES DISTRICT COURT IN THE STATE OF MICHIGAN, THE DISTRICT COURT IMPOSED A REMEDY ON PETITIONERS, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN.

The due process clause of the fifth amendment to the United States Constitution states in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The due process clause encompasses the constitutional guarantee of equal protection of the laws and forbids discrimination by the federal government, where the discrimination is:

> "'. . . so unjustifiable as to be violative of due process.'" *Schneider* v. *Rush*, 377 U.S. 163, 168 (1964); *Boling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

In the instant diversity case, Petitioners have been denied their constitutional guarantee of due process of law for the following reasons:

1) That they have been subjected to invidious and unreasonable discrimination because the harsh remedy imposed by the United States District Court could not have been granted by the state courts of Michigan;

2) that the discrimination by the District Court was sanctioned by the Court of Appeals by a misstatement of the record; and

3) that the discrimination by the District Court was sanctioned by the Court of Appeals by the fabrication of a category of contract which is unknown and unrecognized in the laws of the State of Michigan.

In the instant case, the district court entered judgment in favor of Respondent against Petitioners. That judgment awarded damages measured by the total contract price. That judgment could not have been granted by the courts of the State of Michigan. Consequently, Petitioners have been deprived of their property without due process of law because of the fortuitious circumstance that the instant diversity case was tried in a federal court.

The issue to be determined is whether the actions of the district court and the Court of Appeals in the instant case are "so unjustifiable as to be violative of due process." *Schneider, supra,* 377 U.S. at 168. In order to determine this issue, the law governing the proper remedy for breach of an executory contract, as declared by the Michigan Supreme Court, must be examined.

The law governing the proper remedy for breach of an executory contract has been declared by the Michigan Supreme Court in two leading cases. The first leading case is *School of Commerce* v. *Stroud,* 248 Mich. 85 (1929). There, the defendant entered into a contract, in which he subscribed to three courses of instruction. The defendant then breached the contract, "by his own refusal to perform." The plaintiff stopped performance and sued the defendant. *Id* at 86.

The trial court entered judgment for the defendant. On appeal, the Michigan Supreme Court affirmed:

> "Plaintiff contracted with defendant with full knowledge of defendant's rights, which it must be presumed to know. It knew defendant had a right to renounce the contract and refuse to perform further, and that he thereafter was liable only for damages for breach of contract. Plaintiff made no proof of any damages arising from breach of contract." *Id* at 88.

Thus, the defendant was liable only for "damages for breach of contract," not for the contract price. The plaintiff failed to prove "any damages" and, consequently, judgment was properly entered for the defendant.

The Michigan Supreme Court went on to say:

> "By comity, citizens of Illinois may sue in the courts of Michigan, but the law of Illinois has no extraterritorial force. The courts of this State may not be used to prosecute to effect a cause of action in a manner contrary to the laws of Michigan. A foreign citizen cannot avail himself in the courts of this State of remedies which are denied to our own citizens." *Id* at 89.

The Supreme Court stated the law of Michigan to be:

> "'It is the rule in this State that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract.

> 'The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.'" *Id* at 88.

The Court concluded:

> "Plaintiff having no right to maintain any other action against defendant than for breach of contract, and having adduced no proof of any damage resulting from such breach, none may be awarded." *Id* at 90.

Two years later, the Michigan Supreme Court decided the second leading case, *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482 (1931). There, the defendant entered into a contract with the plaintiff in which it was agreed that the defendant's daughter would attend the plaintiff's school. The contract price was $1,200 for the school year; the defendant paid $550; the remaining balance was $650. The defendant's daughter attended only until Christmas; she did not return for the remaining portion of the school year. The plaintiff brought suit in Michigan, claiming the remaining balance of $650. During the trial, the plaintiff "planted its right to recover solely upon defendant's contract to pay". *Id* at 484 (emphasis added).

The trial court entered judgment in favor of the defendant, for the reason that the plaintiff had offered no proof of damages resulting from the breach of contract. On appeal, the Michigan Supreme Court affirmed. Following *Stroud, supra*, the Court declared:

> ". . . in Michigan it is a rule of law, and we think a rule of procedure or remedy, that *a party* to an executory contract may always stop performance by the other party and *refuse further to perform on his part*, and after his refusal, he is *'liable only upon the breach of the contract'*; and fur-

> ther, quoting from cases cited, it is said: '*The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.*'" *Id* at 486 (Emphasis added).

The Michigan Supreme Court spoke in unequivocal terms:

> "What remedy do the courts of Michigan provide for such cases? Plaintiff is here asserting its right to a remedy by means of which it can recover the full contract price. The courts of Michigan do not provide such a remedy."
>
> ". . . Since the law of this State has fixed the remedy provided in such cases, plaintiff must be content with such remedy if it elects to prosecute its claim in the courts of this jurisdiction; and the rule is not affected by the fact, if it is a fact, that the parties contemplated performance of their executory contract in Massachusetts." *Id* at 487, 488.

Thus, the law of the State of Michigan, which determines the remedy for breach of an executory contract, is clear and unequivocal. Applying this law to the instant case, the bottom line then is whether there is a rational basis or justification for the decision by the district court to award Respondent damages in the full contractual amount, rather than actual proven damages, for breach of an executory contract.

The facts in the instant case are not in genuine dispute. The parties agree that Respondent did not provide advertising services, unless and until Petitioners paid "money in". That Petitioners had not paid the "money in" was the reason for Respondent's counterclaim. The contract was clearly executory on the part of both Petitioners and Respondent. Given these undisputed facts,

there was no rational basis or justification for the decision by the district court to award Respondent damages in the full contractual amount, rather than actual proven damages, for breach of an executory contract.

On appeal, the Court of Appeals affirmed the decision by the district court by stating:

> "We believe there was no error demonstrated in the district court's construing the contract to be indivisible and nonexecutory in its nature." (App. C, *infra*, p. C-6).

However, reading the entire transcript of the argument on Respondent's oral motion for summary judgment (App. A, *infra*, pp. A-1 to A-15) shows that there was no instance when the district court construed the contract.

Surely, if due process is to have any meaning, it embraces the fundamental principle of fairness. For the Court of Appeals to affirm the unfair and discriminatory decision by the district court and to assert that the district court had construed the contract when such statement is without any basis in fact, and is in fact a misstatement of the record, is a violation of due process.

Furthermore, not only did the district court fail to construe the contract, there is no mention in the district court record that the contract was "nonexecutory in its nature". The very concept of a contract being "nonexecutory in its nature" is a total fabrication by the Court of Appeals.

No law or authority is cited by the Court of Appeals to support its assertion that the contract was "nonexecutory in its nature". The question, whether a contract is executory or executed, cannot be answered

merely by construing the written agreement. A contract is not "nonexecutory in its nature". On the contrary, a contract is executory or executed in fact, based on the fact of performance by the parties.

In sum, the category of a contract which is "nonexecutory in its nature" is a fabrication by the Court of Appeals, without basis in law, and is meaningless, self-contradictory nonsense.

There is no rational basis or justification for the district court's awarding a harsh remedy in favor of Respondent, in a diversity case, which is contrary to the laws and is not available in the courts of the State of Michigan. The action of the district court, imposing a judgment on Petitioners for the full contract price, rather than the actual, proven damages, was without any rational basis ". . . and was so unjustifiable as to be violative of due process." In the instant case, Petitioners have been deprived of their property without due process of law.

Likewise, there was no rational basis or justification for the assertion by the Court of Appeals that the district court had construed the contract.

Finally, there was no rational basis or justification for the determination by the Court of Appeals that the contract was "nonexecutory in nature".

II.

THE MANDATE OF *ERIE* WAS VIOLATED WHERE, IN A DIVERSITY CASE, THE DISTRICT COURT IMPOSED ON PETITIONERS A HARSH REMEDY, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN AND WHERE THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT, BY MISSTATING THE RECORD AND BY ERRONEOUSLY FABRICATING AN UNKNOWN AND UNRECOGNIZED CATEGORY OF CONTRACT.

In 1938, in its landmark decision, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Supreme Court of the United States declared:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

During the past fifty years, *Erie* has become the established law of the land. Thus, the *Erie* doctrine requires that in a diversity case, the federal court must follow and apply the law of the state where the federal court sits.

The explicit purpose of the *Erie* doctrine is to prevent the accident of diversity of citizenship from undermining the equal administration of justice in coordinate state and federal courts sitting side by side. *Erie*, *supra*, 304 U.S. at 74-77.

Following *Erie*, this Court decided *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941). There, this Court held:

> "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."

Thirty-five years later, this Court reiterated:

> "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975).

How then, in the instant case, did the Sixth Circuit Court of Appeals affirm the obvious departure by the district court from the law of the State of Michigan, as stated by the Michigan Supreme Court?

The Court of Appeals did so by asserting that the district court had construed "the contract to be indivisible and nonexecutory in its nature". (App. C, *infra*, p. C-6.)

This assertion misstates the record and is erroneous. A reading of the entire transcript of the hearing in the district court will confirm that neither the parties, nor the district court made such a statement or arrived at such a conclusion.

The concept of a contract being "nonexecutory in its nature" was fabricated in total in the Court of Appeals.

More than 100 years ago, this Court declared that a contract is either executed or executory. On the one hand, a contract is executed when "nothing remains to be done"; and on the other hand, a contract is executory when "something is to be done". *Farrington* v. *State of Tennessee*, 95 U.S. 558, 559 (1877). The ques-

tion of whether a particular contract is executed or executory is inherently, therefore, a factual one.

In the instant case, it was the plain unambiguous testimony of Respondent that it did not provide advertising services under the franchise agreements, unless and until the advertising fees were "paid in". Since Respondent was suing for nonpayment of the advertising fees, it necessarily follows that the advertising services were never performed.

However, the answer to the factual question of whether the franchise agreements were executory or executed did not commend itself to the Court of Appeals. In addition to fabricating a new and theretofore unrecognized category of contract, namely, "non-executory in its nature", the Court of Appeals erred by basing its ruling on exceptions and modifications to the law of Michigan which had already been rejected by the Supreme Court of Michigan.

For example, the Court of Appeals ruled that there was no error "in the district court's construing the contract to be indivisible . . ." (App. C, *infra*, p. C-6). However, the Supreme Court of Michigan has already held that whether a contract is indivisible is irrelevant in determining the rule of law in Michigan concerning the appropriate measure of damages for breach of an executory contract.

Because *Rood, supra,* was decided two years after *Stroud, supra,* the plaintiff-appellant in *Rood* strenuously insisted that the *Rood* case should be distinguished from the *Stroud* case on several grounds, including:

> "(3) That notwithstanding this contract covers both board and tuition, it is an indivisible contract, and plaintiff is entitled to recover

> the full consideration." *Rood, supra,* 253 Mich. at 485.

The Supreme Court of Michigan acknowledged that it was "mindful of plaintiff's contention that the instant contract covering both board and tuition is indivisible." *Rood, supra,* 253 Mich. at 489. However, the Court ruled:

> "We think this does not change the rule of law that plaintiff must prove the amount of its damages. It has been repeatedly applied by the courts of this State to contracts which were indivisible in the same sense appellant contends this contract is indivisible. [Citing two Michigan Supreme Court cases]." *Ibid.*

Clearly, the distinction as to whether a contract is divisible or indivisible is not one which has commended itself to the Supreme Court of Michigan.

In addition, the Court of Appeals considered it to be significant that there was a provision in the franchise agreements that the contracts would be interpreted according to Louisiana law. The Court of Appeals stated:

> ". . . we must determine, from the nature and language of the contract, the parties' intent in entering into the franchise agreement under Louisiana law." (App. C, *infra,* C-6)

The Supreme Court of Michigan does recognize a provision in a contract that the contract be interpreted according to the laws of a foreign state. *Rubin* v. *Gallagher,* 294 Mich. 124 (1940). However, even in that instance, ". . . the procedure and remedy for the enforcement of such substantive rights in Michigan are governed by the laws of . . . [the] State [of Michigan]." *Id* at 127.

The Court of Appeals affirmed the clear departure from *Stroud* and *Rood* by the district court and, therefore, "contravene[d] the fixed policy of the law" of the State of Michigan. *Rood, supra*, 253 Mich. at 490.

As discussed above, the *Erie* doctrine mandates that, in a diversity case, the federal court must follow and apply the law of the state where the federal court sits. In the instant diversity case, the mandate of *Erie* was violated where the district court imposed on Petitioners a harsh remedy for breach of an executory contract, which remedy is contrary to the law and is not available in the courts of the State of Michigan.

Moreover, the Court of Appeals erroneously affirmed this violation of the *Erie* doctrine by misstating the record, by fabricating a new and theretofore unrecognized category of contract, and by adding exceptions and modifications which have not commended themselves to the Michigan Supreme Court.

CONCLUSION

This Court should review the instant case for the reason that the conflict between the applicable law of the State of Michigan and the harsh remedy imposed by the district court is clear and unmistakeable. The district court, sitting in Michigan, deprived Petitioners of their property without due process of law and subjected Petitioners to invidious and unreasonable discrimination. The district court flagrantly violated the *Erie* doctrine.

In addition, the Court of Appeals affirmed this denial of due process, discrimination and violation of the *Erie* doctrine, by misstating the record and by erroneously fabricating a category of contract which had theretofore been unknown and unrecognized.

There has been a gross miscarriage of justice!

For all the foregoing reasons, Petitioners respectfully urge this Honorable Court to grant this petition for a writ of certiorari.

Respectfully submitted,

By: /s/ ROBERT V. SEYMOUR (P20251)
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DATED: January 30, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

MOTION FOR SUMMARY JUDGMENT ON COUNTERCOMPLAINT

(United States District Court —
Eastern District of Michigan — Southern Division)

(Proceedings of March 31, 1987)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, Plaintiffs, vs. POPEYE'S FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYE'S FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant — Case No. 85-CV 71383 DT)

Proceedings had in the above-entitled cause before the Honorable Lawrence P. Zatkoff, on March 31, 1987.

APPEARANCES: *On Behalf of Plaintiff*, RALPH W. BARBIER, JR., 34820 Harper Avenue, Mt. Clemens, MI 48043; *On Behalf of Defendant*, LAWRENCE R. ABRAMCZYK, Suite 1100, 400 Renaissance Center, Detroit, MI 48243.

* * *

(3) Detroit, Michigan
March 31, 1987

CLERK: Civil Action Number 85-71383, William F. Gregory versus Popeye's Famous Fried Chicken and Biscuits, Incorporated.

MR. ABRAMCZYK: May it please the Court, at this stage, the Court has dismissed the complaint. It has before it the defendant's counterclaim. It is our position there are no genuine issues as to any material fact relative to the claims made in the counterclaim and that defendants are — or defendant is entitled to judgment as a matter of law pursuant to Rule 56.

Your Honor, the counterclaim has eight counts. I have an additional copy for the Court if the Court desires to look at this while I speak.

THE COURT: Yes. I have a copy, of course, in the file, but it would be more convenient to receive it in this form.

MR. ABRAMCZYK: Before we begin reviewing it, I'll give the Court an overview. There are eight counts. The first six counts relate to the six stores, specifically the six franchise agreements. The last two counts relate to the two promissory notes.

In those first six counts, Popeye's claims there have been defaults by all three defendants of each franchise (4) agreement and specifically the defaults consist of the failure to pay franchise royalties and advertising fees. We plead (a) the existence of the contract and its execution of the counterdefendants; (b) the inclusion of the contract of the provisions to pay the franchise royalty of 5 percent gross sales and advertising fees on a weekly basis of 3 percent gross sales.

Count III, the counterdefendants have failed to pay the franchise royalties and advertising fees as specified in the counterclaim over the period of which the nonpayment occurred through the date of filing. We then allege that the nonpayment constitutes an event of default and find Popeye's has been damaged in the amount of that payment.

Now, let's talk for a moment about where we were in terms of the counterdefendants' position before this trial began, let's talk about how the counterdefendants

responded to the counterclaim. This will take but a moment and I'm going to run this first through the first count because Counts III, IV, V and VI are identical in terms of the allegations and replies to those allegations.

Your Honor, paragraph one of this counterclaim is admitted. Paragraph 2 is admitted. Paragraph 3 is admitted. Paragraph 4 is admitted. Paragraph 5 is admitted. Paragraph six is admitted. Paragraph 7 we will show in Count I is admitted. Paragraph 8 is admitted. Paragraph 9 is (5) admitted. Paragraph 10 is admitted.

At this point, the manner of pleading by the counterdefendants changes a little bit so we get into the substance of each paragraph of the countercomplaint. And paragraph 11 says as of May 14, 1985 counterdefendants were delinquent in the payment of 144 weeks franchise royalties totaling 98,899.18. And that paragraph the counterdefendants neither admit nor deny the allegation.

They also admit, however, they made — they did not pay the franchise royalties, but they neither admit nor deny the amount. So we have an admission of the fact of nonpayment and then I'm left to my proofs on the amount. First this represents the first issue of disputed fact that I faced before trial began.

Now, at this point in trial, where are we on that allegation? I've noted in my margin on the counterclaim we have Exhibit 184, a stipulated exhibit, perhaps we could get that in front of us. And I have an additional copy, if the Court needs it.

THE COURT: No. I have it.

MR. ABRAMCZYK: All right. Stipulated Exhibit 184 indicates, first, with respect to advertising fees and at the bottom of the page with respect to royalties, the delinquencies broken down by store, by total amount per store and then by the opening periods, that is the weeks in which (6) payments did not occur.

At this point in time of the counterclaim we are only talking about the bottom part of that sheet, franchise royalties. It's a stipulated exhibit. Counterdefendants admit, by virtue of the fact of nonpayment, they've already admitted that in the pleading. But now they admit further they have not paid franchise royalties for Store 208, Troy store, in the amount of $139,139.22 for the weeks that are listed on the right-hand side.

Counterdefendants admit they have not paid franchise royalties for Store 311, Pontiac store, in the amount of $102,687.77 for the period referenced in the right-hand side.

Counterdefendants admit that they have not paid franchise royalties for Store 361, the amount showing on the sheet for the weeks showing on the sheet. They admit — and Store 361 is the West Bloomfield store.

They make a comparable admission of nonpayment for the Mt. Clemens store, number 377, in the amount shown for the weeks shown.

Make an admission of the fact of nonpayment for the period of nonpayment for store 430, the Southfield store, in the amount shown for the weeks shown.

And finally they admit, by virtue of admission of this exhibit, the fact of nonpayment, amount of nonpayment (7) for the period of nonpayment for the Utica store for the last year. The store was closed and the Court will note this exhibit does not reflect delinquency for the franchise royalties after the date of closure, so we are not seeking royalties beyond the date of closure.

THE COURT: Is there any dispute as to what this exhibit means?

MR. BARBIER: No.

THE COURT: You agree with what Mr. Abramczyk has said.

MR. BARBIER: I agree the amounts aren't paid. I don't agree nor do I dispute the amounts that are on there.

MR. ABRAMCZYK: So I would submit at this point, paragraph 11 of that counter claim has been covered. The only open area was the counterdefendants refusing to admit or deny as of the date of filing their answer to the counterclaims the amounts or periods involved. We are now over that hurtle, that's no longer a disputed fact. We now move to paragraph 12 of the counterclaim.

At that point, Popeye's has plead delinquency of fees of advertising fees over a 144 week period in the amount of $85,003,514 for this particular store covered by Count I. And Count II, III, IV, V and VI have the same kinds of allegations relative to the nonpayment of advertising fees for the other stores. We had a reply, an answer to the (8) counterclaim which admitted the fact of nonpayment of advertising fees in each count, but again left us to our proofs as to the amounts and the periods.

I would submit again that stipulated Exhibit 184 overcomes the need at this point in time for proofs as to the amounts of advertising fees that haven't been paid and the periods to which and stores to which they relate. Now of course I'm addressing the Court's attention to the top half of Exhibit 184 wherein there is detail for advertising fee delinquencies. I'm not going to go through this the second time, the format is exactly the same.

I submit, with respect to paragraph 12 of the counterclaim and the corresponding paragraphs in Count II, III, IV, V and VI, there are no facts to try. The amounts that have not been paid are stipulated to, stores to which they relate have been stipulated to by virtue of this exhibit. Periods of which the stores are delinquent have

been stipulated in which they occur. So paragraph 12 is no longer a subject of the trial.

Let's move to paragraph 13. Paragraph 13, I plead the counterdefendants failure to pay the advertising fees and royalties are defects of the franchise. Paragraph 3 the counterdefendants admitted their failure to pay, but they neither admitted or denied the legal conclusion that the failure to pay these royalties and fees constituted an event of (9) default. Let's address that issue.

Is the failure to pay royalties and advertising funds an event of default? At this point, I would address the Court's attention to the franchise agreements themselves. As the Court will recall, the franchise agreements are identical in content from store to store. That being the case, we need look at only one. I would address the Court's attention to Exhibit 3 which is the franchise agreement for the Troy store and I would ask that the Court look specifically at page 19 of Exhibit 3. Does Your Honor have that page?

THE COURT: Yes, I do.

MR. ABRAMCZYK: Paragraph 13 is titled termination and I would like to read — I believe it is the third sentence which is about five lines down and starts with the word franchisee. It says:

> "Franchisee shall be in default hereunder for any failure substantially to comply with any of the requirements imposed by this franchise agreement, as it may from time to time reasonably be supplemented by the confidential operating manual or otherwise in writing, or to carry out the terms of the franchise agreement in good faith, including, without limitation. Any of the following events:
> "Number 1, if franchisee fails or refuses promptly to pay any monies owing to franchisor or its (10) subsidiaries" . . .

There's more in the sentence, but that's the relevant portion.

So, counterdefendants in paragraph 13 of their answer say their nonpayment — or don't admit their nonpayment isn't an event of default.

I submit the contract language that I have just quoted makes it very clear that the nonpayment is an event of default. So far as I'm concerned, there's nothing to try at this point in time under paragraph 13.

We move to paragraph 14 which is the final paragraph of the counterclaim. At that point, I plead that as a result of their breach we have been damaged in the amounts that haven't been paid and the counterdefendants deny that there's been any breach and they neither admit nor deny or make allegations.

I pointed out that that pattern of pleading goes right through their answer and, at the end of the answer, an affirmative defense is raised. And that affirmative defense — and I'll paraphrase — we don't owe the money because of the breach of contract we have plead in our complaint against Popeye's. As the Court is obviously aware they were given their day in court on the complaint and they didn't carry their burden of proof and that complaint was dismissed. With that dismissal came the basis for their refusal and failure to pay. The Court found that they haven't proven any breach of contract (11) by Popeye's.

So, at this point in time, with respect to Counts I through VI, they've admitted the contract, they have admitted the provisions in the contract requiring the many payments, they have admitted the fact of nonpayments, they have stipulated the amounts of nonpayment. I have shown that nonpayment is an event of default. What's left to try? I submit at this point in time we are entitled to judgment, that's with respect to Counts I through VI.

Counts VII and VIII deal with the two promissory notes that were signed in 1982. And their admissions of the execution of the promissory notes are made, admissions of the fact that the promissory notes have not been repaid in accordance with their terms. And then in 184 at the bottom we have an admission as to the amounts due on the notes. For purposes of this stipulated Exhibit 184, we put the two notes together. It says amount due on notes, $5,358.66. That represents the balance on the two promissory notes by the admission of the defendants. I submit, again, the compilation of the admissions in the exhibits preclude the need for any proofs at this time.

What else am I asking for? I'm asking for interest on the unpaid fees. Does the contract call for the payment of interest? Is this a question of what the contract says? Look at paragraph III(C) page 4 of Exhibit 3, page 4 of (12) the franchise agreement. At that point, about two thirds of the way down, contract reads:

> "If any monetary obligations owed by franchisee to franchisor and its subsidiaries and affiliates are more than seven days overdue, franchisee shall, in addition to the obligation, pay to franchisor, a sum equal to one and one half percent of the overdue balance per month, or the highest rate permitted by law, whichever is less."

So there is a predicate in the contract for the imposition of interest.

Exhibit 184 contains the stipulation of the parties as to the amount of interest that's due and I would just add, parenthetically, certain amounts of interest have been waived by plaintiff. These are the amounts of interest due by stipulation of the parties.

I would ask in my motion for summary judgment that all three defendants, Michael Sullivan and William Gregory and their corporation Sullivan and Gregory,

Inc., be found liable for these sums jointly and severally. And the basis for that claim again is contract language. The opening language contained in the contract makes it very clear that these gentlemen are signing jointly and severally. If the Court will look at page one of the Exhibit 3, franchise agreement, I think it is very clear the words jointly and severally have been (13) typed in after their names in capital letters. And, if the Court will recall, there was testimony at trial elicited by Mr. Barbier from his own clients that they indeed signed the agreements in their individual capacities, obligating them in their individual capacities. And so, I would submit that on the question of joint and several liability, there is no need for proofs.

So, Your Honor, that's the basis for the motion. At this point in time, I don't feel there are any disputed issues of fact to be tried.

THE COURT: Mr. Barbier?

MR. BARBIER: For the record, we have put in our proofs and would adopt our position we took in our original complaint. Obviously, I would not take the time to reargue that. I have argued it to the Court, the Court has ruled against me.

But I do add, as far as the franchise — excuse me, as far as the advertising fees are concerned, it really is a illusory contract. By their own admission during trial, they in fact said that it is money in-money out. They have not sustained any damage with regard to the contract and in fact, the other exhibits which we had marked and had been admitted show that the owner of Popeye's in fact owes well over, I think it is, two million dollars to the fund. And therefore, it is our position and I will not — The case law we cited on page 10 (14) and 11 and 12 of our trial brief sets forth our position that they should not be entitled to this because in fact they have not sustained any damage.

The contract does in fact call for a three percent advertising fee. We do not dispute that. But notwithstanding that the Louisiana law is well settled, there must be mutuality of obligation in order to enforce a contract and it should not be illusory. In fact, this one is. They wish us to now come back and pay funds that they did not pay, they did not use, they did not suffer any damages as a result of this alleged breach in the countercomplaint. And, therefore, a logical construction of this would mean it is not due and owing. The simple fact a contract calls for payments when nothing in fact is paid or used, then I don't see how they can argue there has been any damage.

Secondly, as far as the administrative fee which was supposed to be one percent or one third of the amount owing in 184, there's been nothing to administer. And I would submit to the Court again, in their own accountings that have been submitted in this trial, it shows that there are millions owing in that particular fund to the owner of Popeye's, that funds are used out of that particular Advertising Fund from our dollars to pay his expenses and therefore I do not think they're entitled to collect something they haven't used and haven't been damaged.

(15) And, therefore, our position is, on the Advertising Fund, in addition to what we have argued before, they are not entitled to any amounts.

THE COURT: Do you wish to respond to that?

MR. ABRAMCZYK: Yes, sir.

The argument seems to be that if you don't pay the advertising fees in, then they can't be spent on local and regional advertising and weren't spent on local and regional advertising, therefore, we don't owe them, we haven't been damaged.

That argument fails because the advertising fees fund advertising on an ongoing basis. And the testimony

shows that production and administration costs are charged back to franchisees on an ongoing basis. Deficits grow per those accounting statements and the franchisees local and regional advertising accounts and the production and administration expense category were not paid. So, with respect to one percent of the three percent, there's no question the client has been damaged.

The money has been spent, it has been charged back to the franchisees. And what happens is that when it is not paid, it is charged to other franchisees system wide to a reserve, so the damages are very real.

What about the other two percent that Mr. Barbier claims should not have to be paid because when it was (16) paid, no advertising was done on a local and regional level? It is Popeye's intention and desire to utilize that money for spending in this marketplace, for hard spending in this marketplace, when it is paid, that's why that provision is in the contract. That's why the contract says that the money doesn't have to relate to a particular accounting period and Mr. Jorgensen testified about it being rolled over in the early stages of these franchisees franchise existence.

So, if a franchisee doesn't pay it, it is not just forgotten about. That money is denied to this marketplace in the future. And it is the franchisors intent per this contract provision to insure that advertising is going to be placed in this marketplace in the future by requiring the payment of fees.

Popeye — the other franchisees in this marketplace, Mr. McMurtry and Clark are denied advertising to which they're entitled when these franchisees' advertising fee indebtedness is forgiven by the Court vis a vis the argument made by Mr. Barbier. That is a hard debt. The contract calls for the payment of franchise and advertising fees every week in the amounts speci-

fied for every week, that the franchisee uses the franchise. That's the way the contract reads and that's what we're asking. And if, after they paid the monies that they owed and it is not spent in accordance with the contract, then they have a cause of action for breach of contract by (17) Popeye's. But at this point in time they don't have that cause of action.

Popeye's has the cause of action for collection, contract calls for payment on a weekly basis. They've said we don't owe it because you breached the contract Popeye's. The Court said yesterday, Popeye's — the Court said to the plaintiff you didn't meet your burden of proof, you didn't show any breaches. So the obstacle to payment is removed. We have a contract calling for weekly payment, the fact of nonpayment, the reason for nonpayment given is the breach by Popeye's, that reason has been eliminated.

So, what's before the Court is the obligation to pay advertising fees on a weekly basis per this contract provision and that's what we're asking be enforced. If the advertising fees, if the Advertising Fund isn't administered in accordance with the terms of the contract after the monies are paid, then they have another day in court to come in and say we paid, whatever the figure is, 350 some thousand dollars of advertising fees per the contract per the instructions of the court enforcing this contract and per the fund that Popeye's has established.

I submit, Your Honor, they are indeed required to pay the fees.

THE COURT: What about the two million dollars that's owed by another franchisee that was not collected.

(18) MR. ABRAMCZYK: If the Court will remember, that was the testimony of one of these gentlemen. It wasn't the testimony of anyone from Popeye's.

THE COURT: That was an exhibit.

MR. ABRAMCZYK: That was a Coopers and Lybrand statement. It is my understanding that's just a snapshot as to a particular date a period in time, end of years. There's a drag on receivable that shows as to the end of the fund, it shows as a liability to the fund. In fact, that's a good argument why they have to pay it. Coopers-Lybrand come in, they audit the fund, they see this receivable and they show the world at large that it is an asset of the fund. What does that tell the world at large? The fund is going to collect that money, it is an asset of the fund's, that's why it is shown as an asset of the fund.

The auditors say the money is owed and it's got to be paid. And it was going to be paid. If it wasn't going to be paid, it wouldn't show it as an asset. That argument mitigates against what they're saying. If what they're saying is true, if the monies aren't paid and after a passage of time the advertising isn't placed and money is not due, Coopers and Lybrand would not have received the two million dollars from Copeland Enterprises as an asset. But Coopers and Lybrand do carry it as an asset, it is an asset to the fund, it is a corresponding liability to Copeland Enterprises. It has got to (19) be paid. That's why we're standing here.

I'm saying that to the fund, the advertising fees that these men owe is an asset. To them, just as to Copeland Enterprises, it is a liability to Mr. Gregory and Sullivan. I'm asking the Court make them pay that admitted liability to the fund so the fund can take that asset and spend it. I'm asking the Court to enforce the Coopers and Lybrand audit.

MR. BARBIER: May I respond breifly?

THE COURT: You may.

MR. BARBIER: Your Honor, not only will the exhibit clearly show that the — I refer the Court to Exhibit 182 — 181 which is for the years 1984 and '85.

MR. ABRAMCZYK: What's the number, counsel?

MR. BARBIER: 181.

THE COURT: I have it.

MR. BARBIER: It says that related party receivables for '84 and '85 and they not only show the money isn't paid, but now they're letting him write it off to the tune of almost a half a million dollars, quarter of a million before that as doubtful receivable. Which is very convenient for the owner and not to pay into the fund and simply write it off. On related party transactions, you will see that they have expended money to A. Copeland Enterprises. In a closely-held corporation, Your Honor, there's a lot of stuff (20) that can be used to protect someone and I would suggest to this Court that again, it is an illusory contract that hundreds of dollars of thousands of dollars owed by the Copeland Enterprises as per these exhibits clearly show there is no intent to ever collect this money, but in fact write it off over a period of time letting Mr. Copeland off the hook and therefore to come into this Court and suggest that now my clients should now pay into the fund when it's not in fact used the way counsel has suggested.

MR. ABRAMCZYK: Mr. Barbier is dead wrong on that footnote. The receivable from Copeland Enterprises, the company operated stores that Copeland Enterprises runs and others are receivables from people like Mr. Gregory and Mr. Sullivan. That's others. And there's an accounting charge to a loss reserve when the others, like Mr. Gregory and Mr. Sullivan, go delinquent for three years. We have heard no testimony at all about a charge off of the Copeland Enterprises receivable. I'm prepared to offer proofs if you want to get into it.

Now counsel is arguing beyond the exhibit. The only testimony was his own client's impression of this footnote. But the language here is A. Copeland Enterprises

receivable in the amount of $100,666. Others — something other than A. Copeland Enterprises, Inc. — a receivable of $1,219,573.

(21) THE COURT: Gentlemen, I see that as a collateral issue, whether it may or may not be something that the franchisees would want to take up as a group, if what counsel for plaintiff says is true, that's a collateral issue, in my opinion, to this litigation.

For the reasons stated on the record by counsel for the defendant and counterplaintiff, this Court is going to enter a summary judgment in favor of the defendant in the counterclaim in the amount set forth in the Joint Exhibit 184.

MR. ABRAMCZYK: Does the Court find the liability to be joint and severable.

THE COURT: The Court finds the liability to be joint and several.

MR. ABRAMCZYK: Thank you.

THE COURT: Gentlemen. What would you like to do with the exhibits pending an appeal in this action?

MR. ABRAMCZYK: I would request that Mr. Barbier keep them, if that is all right with them, or I'll take them.

MR. BARBIER: No, no. I'll take them.

THE COURT: I'm going to retain the Court copy of exhibits that have been furnished to me and we will retain these for approximately six months or thereabouts. I'm going to order then that counsel for the plaintiff take custody of the exhibits that have been received here during this trial. Is there anything that either counsel wishes to place on the (22) record at this time?

MR. ABRAMCZYK: Defendants do not, Your Honor.

MR. BARBIER: Nothing, Your Honor.

THE COURT: Thank you for your attention in this matter, gentlemen.

(Proceedings concluded at 8:55 am.)

(Certificate of Reporter Omitted)

APPENDIX B

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(April 3, 1987)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, Plaintiffs/Counter-Defendants, vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYES FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant/Counter-Plaintiff — CASE NO. 85-CV-71383-DT; HON. LAWRENCE P. ZATKOFF)

AT A SESSION of said Court held in the United States Courthouse in the City of Detroit, State of Michigan, on the 3rd day of April, 1987.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF, UNITED STATES DISTRICT JUDGE.

This matter having come before the Court for trial; Defendant having made a motion to dismiss at the conclusion of Plaintiffs' case; the Court, in a ruling from the bench on March 30, 1987, having granted Defendant's motion to dismiss for the reasons stated on the record; Defendant thereafter having moved for summary judgment on Defendants' counterclaim; the Court, in a ruling from the bench on March 31, 1987, having granted Defendant's motion for summary judgment for the reasons stated on the record, said judgment being in the specific amounts detailed on stipulated trial exhibit 184,

IT IS HEREBY ORDERED that Plaintiffs' Complaint is dismissed with prejudice, and

JUDGMENT IS HEREBY ENTERED in favor of Defendant/Counter-Plaintiff Popeyes Famous Fried Chicken & Biscuits, Inc., and against Plaintiffs/Counter-Defendants William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., jointly and severally, in the amount of Nine Hundred Twenty Six Thousand Four Hundred Twenty and 79/100 ($926,420.79) Dollars, together with interest from the date hereof computed in accordance with the provisions [*of*] 28 USC 1961, to wit, five and 68/100 (5.68%) percent, computed daily and compounded annually.

/s/ LAWRENCE P. ZATKOFF,
UNITED STATES DISTRICT JUDGE

(Certification Omitted)

APPENDIX C

OPINION
NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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(United States Court of Appeals – Sixth Circuit)

(Filed September 9, 1988)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN, and SULLIVAN-GREGORY, INC., Plaintiffs and Counter-Defendants-Appellants, v. POPEYES FAMOUS FRIED CHICKEN AND BISCUITS, INC., formerly known as POPEYES FAMOUS FRIED CHICKEN CORPORATION, Defendant and Counter-Plaintiff-Appellee — No. 87-1461; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: **KEITH** and **WELLFORD**, Circuit Judges; and **EDWARDS**, Senior Circuit Judge.

PER CURIAM.

We are concerned in this appeal with a dispute over restaurant franchises centering upon the plaintiff/franchisee's nonpayment of advertising fees and the defendant/franchisor's duty to advertise. Sullivan-Gregory, Inc. (SGI) sued Popeyes, Inc. (Popeyes), alleging breach of Popeyes' duty to provide adequate advertising, and Popeyes counterclaimed for franchise royalties and advertising fees due under the franchise agreements. The district court dismissed SGI's action against Popeyes for failure to establish a prima facie

case, and then proceeded to enter summary judgment for Popeyes on its counterclaim. We affirm the district court's decisions in both respects.

Popeyes is a Louisiana franchisor of spiced fried chicken restaurants. SGI is a Michigan corporation whose sole shareholders are two businessmen, Sullivan and Gregory. In 1978, SGI entered into franchise option agreements with Popeyes for the development of Popeyes franchises in Detroit suburban areas. Over the next five years, SGI developed six Popeyes franchises in the area, each covered by a separate agreement. Under these franchise agreements, SGI was obligated to pay an initial franchise fee of $20,000, a weekly royalty fee in the amount of 5% of gross sales for the preceding week, and a weekly advertising fee in the amount of 3% of gross sales for the preceding week.

Even as SGI began opening additional new restaurants in the early 1980s, it was experiencing losses in its existing stores. Business suffered from economic recession in Detroit and from the entry of Kentucky Fried Chicken into the spicy chicken market in the Detroit area. Shortly after opening its first restaurant, the franchisee fell behind in its payment of royalties and advertising fees. Over the years these delinquencies increased, until at the time of trial, the combined delinquencies (including the amount of promissory notes executed embodying delinquencies) amounted to more than $900,000. Notwithstanding these delinquencies, SGI continued to operate the Popeyes franchises and to receive operational support from Popeyes. During the early 1980s, Popeyes also provided advertising and marketing support and, eventually, radio and television advertising in the Detroit area.

In March 1985, SGI filed its complaint against Popeyes, alleging that Popeyes had breached its duty under the

franchise agreements to provide adequate advertising or promotion. Popeyes counterclaimed against SGI for failure to pay franchise royalties and advertising fees due under the six franchise agreements and to collect money due under two defaulted promissory notes. Following SGI's presentation of proof at trial, Popeyes moved the district court to dismiss the action. The motion was granted on the ground that SGI had failed to establish that Popeyes had breached any provision of the franchise agreements regarding advertising. Following an oral hearing, the court granted Popeyes' motion for summary judgment on its counterclaim and entered judgment against SGI in the amount of $926,420.79.

SGI argues that the district court erred in its construction of the franchise agreements. First, it contends that the agreements should have been construed against Popeyes as drafter thereof and, further, that they should have been read to require what SGI considered to be "adequate" advertising. The agreements each contain an integration clause and a choice of law provision stating that Louisiana law shall govern the interpretation of the agreement. The agreements state the following with regard to advertising by Popeyes:

> . . . Franchisee, recognizing the value of advertising and the importance of the standardization of advertising and promotion to the goodwill and public image of the POPEYES Famous Fried Chicken System, agrees to pay to The POPEYES Famous Fried Chicken Advertising Fund a recurring, non-refundable advertising fund contribution to be paid on a weekly basis, . . . of three percent (3%) of the gross sales for the preceding week . . . , which sum shall be expended by The POPEYES Famous Fried Chicken Advertising

> Fund . . . , administered for national, regional and local advertising and promotional materials for the POPEYES Famous Fried Chicken System. All reasonable costs incurred by Franchisor . . . for the production and dissemination of such advertising and promotional materials may be charged to The Advertising Fund . . . . *There shall be no requirement that all or any part of the Fund be disbursed within any accounting period. Selection of media and locale for media placement shall be at the sole discretion of the Administrator of The Fund.* Franchisee understands that such advertising is intended to maximize the public's awareness of POPEYES Famous Fried Chicken restaurants, and that *Franchisor accordingly undertakes no obligation to insure that any individual franchisee benefits directly or on a pro rata basis from the placement, if any, of such advertising in his local market.*

(Emphasis supplied).

SGI complained that Popeyes failed to commit funds to broadcast media advertising in the Detroit area when SGI first opened its stores (the first in the Detroit area), instead waiting until 1981 when several of SGI's Popeyes franchises had opened. Essentially, it asserts also a failure to provide adequate advertising in the Detroit area to counter competitive entries into the spicy chicken market. The district court interpreted the above stated provision of the franchise agreement to leave to the Fund Administrator's discretion the timing, selection, and placement of advertising. Furthermore, the district court held that the agreement did not require the Administrator to undertake the duty to please individual franchisees, including SGI, by selecting advertising that specifically benefitted a par-

ticular market or a particular store. SGI did not allege or prove a complete failure by Popeyes to provide advertising and promotional materials; instead, it alleged that Popeyes had provided too little advertising in Detroit and not as much promotional assistance as SGI believed was necessary to give it the "help" needed.

We find no error in the district court's conclusion that SGI failed to establish a prima facie case of Popeyes' breach of any contractual obligation relating to the franchises. SGI's argument that the franchise agreements were contracts of adhesion to be construed in the franchisee's favor is not persuasive. Plaintiff's complaint was not, therefore, improperly dismissed.

The franchise agreement between the parties provides that the agreement "shall be interpreted and construed" under Louisiana law. Michigan courts hold such contractual choice of law provisions importing a foreign state's substantive law to be valid and enforceable. *See, e.g., Hardy* v. *Monsanto Enviro-Chem Systems, Inc.*, 414 Mich. 29, 323 N.W.2d 270, 294 (1982); *Rubin* v. *Gallagher*, 294 Mich. 124, 127, 292 N.W. 584 (1940). Therefore, Michigan courts would honor the parties' intent that obligations under the contract be resolved under Louisiana law.

Even when the parties have chosen a foreign law to govern the interpretation of their contract, however, Michigan law, as *lex fori*, still governs questions of procedure and of the remedies available to the parties. *See Rubin*, 294 Mich. at 128; *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482, 486, 253 N.W. 227 (1931). In an action such as this, the remedy available to the plaintiff is the *remedy* afforded by Michigan law. *Rubin*, 294 Mich. at 128.

The choice of law question in this case relates to the question of damages owed by SGI arising from its delin-

quency in payment of advertising fees due under the franchise agreements. SGI contends that the district court erred in finding it liable in the total amount of delinquent fees claimed. It claims that the agreement to pay advertising fees was executory because Popeyes administered the advertising fund on a "money in, money out" basis; therefore Popeyes' performance of the franchise agreement was dependent on and would occur *after* SGI's payment of advertising fees. Under Michigan law, a party to an executory contract is liable only for actual damages resulting from a breach, and not necessarily for the full contract price. *See Rood*, 253 Mich. at 486; *Walton School of Commerce* v. *Stroud*, 248 Mich. 85, 88-89, 226 N.W. 883 (1929). Therefore, SGI maintains that it should be held liable only for actual damages suffered by Popeyes and not for the total delinquency claimed. (There was no real dispute as to the total amount claimed under the agreements.)

We must therefore decide whether the advertising fees provision in the franchise agreements was in fact an executory agreement that was independent of the rest of the terms of the franchise agreement. To do this we must determine, from the nature and language of the contract, the parties' intent in entering into the franchise agreements under Louisiana law.

Under Louisiana law, an agreement which contains several different undertakings is construed generally contrary to the notion that the different undertakings are independent and divisible. *Cf. Stockstill* v. *Byrd*, 132 La. 404, 61 So. 446 (1913). SGI's several undertakings, as well as Popeyes', would therefore be considered as dependent and part of the whole agreement absent language indicating the contrary. We believe there was no error demonstrated in the district court's construing the contract to be indivisible and nonexecutory in its

nature. *Cf. S&W Investment Co.* v. *Otis W. Sharp & Son, Inc.*, 247 La. 158, 170 So.2d 360 (1964). Louisiana law enforces a contractual requirement in accordance with the plain language of the agreement and in order to ratify the expressed intent of the parties. *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 484 (5th Cir. 1984). We believe the district court has followed this precept in this case.

Considering the question of damages to be a matter of remedy governed by Michigan law, as that of the forum state, we note that SGI did not contest Popeyes' claim by asserting before the district court that Popeyes had not proved its performance. Rather, SGI claimed that Popeyes was required to establish the amount of actual damages caused by SGI's default in paying the contractual royalties and advertising allowances. It also claimed a defense against Popeyes of "supervening impossibility of performance," asserting that payment of the fees was impossible because it was "losing thousands of dollars and was closing its stores," citing *Bissell* v. *L. W. Edison Co.*, 9 Mich. App. 276, 284-85, 156 N.W.2d 623 (1967). (See appellant's reply brief at pp. 19, 20).[1] We conclude that an "impossibility" defense based upon economic recession and the failure of a franchise business to live up to its hoped for potential is not a viable affirmative defense to a claim of debt for failure to pay an unambiguous contractual obligation.[2]

The agreements in question indicated the parties' intent that advertising fees (and royalty fees) were to be

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[1] SGI's other affirmative defense, that Popeyes had breached the agreements, was foreclosed by the district court's finding that SGI had failed to make out a prima facie case on its original claim.

[2] A part of SGI's claimed defense of impossibility of performance pertained to its assertion that the advertising fund was mismanaged. We perceive no error in the district court's decision that this was a collateral, and essentially immaterial, issue.

utilized for the ongoing promotion of the Popeyes system as a whole. They did not provide that advertising and promotion services were first to be performed in the Detroit area before SGI's obligations to pay the fees were triggered. During the entire period in dispute, SGI was accorded the franchisor's product line, food techniques and formulas, restaurant design and operating procedures, logo, store manuals, and the like. Whether SGI's stores directly received $925,000 worth of Detroit area newspaper, television andother media advertising is not the question; under the franchise agreements, Popeyes was not obligated to allocate SGI's payments to Detroit area advertising. SGI utilized Popeyes' services and name during the period involved, and it had an interrelated, dependent obligation to make the prescribed payments for these services, even though the services were not as extensive or "helpful" as SGI desired. SGI incidentally acknowledged its ongoing liability from time to time by executing promissory notes representing unpaid and accrued cash obligations. The Michigan authority cited by SGI does not, in our view, support any contrary principles to those expressed herein.

SGI did not repudiate the franchise agreements during the period in dispute. It continued to operate the Popeyes franchise restaurants and continued to receive the benefits of the Popeyes support system. It cannot now complain that Popeyes must prove actual damages rather than the agreed contract fees due and payable arising out of SGI's ongoing breaches.

Nor do we find error in the grant of summary judgment by the district court. In reviewing the motion for summary judgment, we consider the evidence in the light most favorable to SGI, but we discern no genuine issue of material fact regarding SGI's liability on the

contract delinquencies. The district court found that SGI had not established a prima facie case of Popeyes' breach of contract. The fact and amount of nonpayment of franchise agreement fees were not disputed. Because SGI failed to allege any specific facts that could establish a genuine defense to its liability or to the amount thereof, we conclude that the district court's grant of summary judgment was proper. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-24 (1986).

We accordingly **AFFIRM** the judgment for Popeyes.

APPENDIX D

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 4, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter-Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., Defendant and Counter-Plaintiff-Appellee — NO. 87-1461)

BEFORE: **KEITH** and **WELLFORD**, Circuit Judges;
EDWARDS, Senior Circuit Judge.

The appellants have petitioned the court to rehear its decision of September 9, 1988, affirming the judgment of the district court.

The court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not to be well taken.

It is therefore **ORDERED** that the petition for rehearing is **denied**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 9, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter-Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., FORMERLY KNOWN AS POPEYES FAMOUS FRIED CHICKEN CORPORATION, Defendant and Counter-Plaintiffs-Appellees [*sic*] — No. 87-1461)

BEFORE: KEITH and WELLFORD, Circuit Judges, and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX F

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 29, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., Defendant and Counter Plaintiff-Appellee — NO. 87-1461)

Upon consideration of the motion of the appellants to stay issuance of the mandate pending application for writ of certiorari, as well as the response of the appellee in opposition thereto,

It is **ORDERED** that the motion be and hereby is **granted** for a period of sixty (60) days from the date herein.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk